Central Law Journal.

ESTABLISHED JANUARY, 1874.

VOL. 74 ST. LOUIS, MO., JUNE 21, 1912. No. 25

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TEST OF THE PRINCIPLE THAT THE JURY ARE JUDGES OF THE LAW AND THE FACTS IN CRIMINAL CASES.

The province of the jury in a criminal case to judge both the law and facts was attempted to be carried to its final analysis in a case lately tried in a Georgia court. And the Court of Appeals of that state held that the trial court committed error in refusing to validate this attempt by not receiving a verdict as provided by the Georgia constitution. This ruling was by a majority of two of the three members, one dissenting in an elaborate opinion. Register v. State, 74 S. E. 429.

The case has something in the way of relevancy to the agitation which is in the land about judicial recall and the recall of judicial decisions. But independently of this agitation the discussion it suggests is interesting.

The facts in the case show that a jury in a homicide case were instructed by the court as to murder, voluntary manslaughter, and justifiable homicide in self-defense. They returned into court a verdict finding the defendant guilty of involuntary manslaughter, which verdict the court declined to receive and directed them to retire for further deliberation.

Upon their retirement defendant's counsel presented a written request for an instruction as to the grades of involuntary manslaughter, which request the court refused to give.

Later the judge brought the jury to the court-room and, in response to a question by the foreman as to whether there were any degrees in involuntary manslaughter, the court replied that he had given them instructions as to voluntary manslaughter, but none with reference to involuntary manslaughter. The jury retired and brought in a verdict for voluntary manslaughter.

Defendant filed motion for new trial and claimed that, though there are two grades of involuntary manslaughter and no objection was made to the verdict for failure to specify a grade, the verdict should be taken as a verdict for the lower grade of punishment, and thus it was a verdict of legal certainty, and that the court erred in allowing it to be supplanted by a verdict for voluntary manslaughter. The Court of Appeals ruled that a new trial should have been granted.

It seems strange that a new trial should have been moved for in the case, but the court may have been justified in limiting the relief to what was prayed for. The court says: "In this case the verdict of involuntary manslaughter which was found by the jury in the first instance, was an acquittal of all the higher grades of the homicide (as the Georgia courts hold), and must be treated as equivalent to a finding that the defendants were guilty of involuntary manslaughter in the commission of an unlawful act."

The court, therefore, recognized that a finding of legal validity had been returned, and it said, that the form in which this question was presented was probably not technically correct." But independently of that it gave it consideration, because "the question lies at the very foundation of the right of jury trial."

But, if the verdict, though wrongly rejected, had sufficient validity about it to confine the next trial to the question of involuntary manslaughter or acquittal, then it also ought to have had enough validity for the appellate tribunal to have directed its entry of record as a lawful verdict and that sentence be pronounced thereon.

Thus see the situation of this case. The Court of Appeals holds that the trial judge's instructions were correct in making no reference to involuntary manslaughter, because there was no evidence to support such a verdict. If consideration of all higher degrees is eliminated by the verdict, then what is the trial court, to which the case is remanded, to do, when the case

again comes up for trial? If the evidence is the same he must either instruct as to a degree of homicide, as to which there is no evidence, or he must direct an acquittal.

But by the judgment of a jury, as judges of the law, it has been determined, as the law of this case, that there are facts which will support a verdict for involuntary manslaughter. That determination—being a determination in defendant's favor—would seem to be one that the court could not reverse upon any appeal by the defendant from a succeeding trial, because he should not be allowed to blow hot and blow cold on the same proposition.

Thus we see that a jury not only makes law for a particular case, but it makes law, which is opposed to the law which the court in another case will say is not law at all, and in that particular case a court must either instruct that this bad law is good law or it will be forced to direct an acquittal, because there is no intervening grade of homicide.

Under this view another thing appears. The court says the question was not raised in the technical way it should have been raised. Defendant, however, not only does not lose by his failure to observe technicality, but he profits by it. He cannot be again tried for a higher grade and he puts the court in the quandary of instructing bad law or directing a verdict of acquittal.

When, therefore, the Court of Appeals waived the non-observance of technicality, it made its grace count more greatly in defendant's favor, than had it merely given him leave properly to present the question. A proper presentation, the court says, "Should have been made by direct exception at the time of the action of the court in refusing to receive the verdict for involuntary manslaughter and directing the jury to return to their room for further consideration, or by an exception contained in the final bill of exceptions."

We are not sufficiently advised about Georgia practice as to whether either of the exceptions might be made to appear unless motion for new trial be filed. We believe, generally, that they could not.

But, if defendant is driven to move for a new trial, when a verdict has been legally returned, which he is willing to accept and to the acceptance of which the state has no right to object, before he can get the benefit of that verdict, then practice is at fault. It is at fault, too, very seriously, because it violates a constitutional principle that one shall not be twice tried for the same offense, except upon his own motion. This is still more serious under rulings that where a verdict for a lower degree is set aside there is no acquittal of the higher degrees.

This is not at all like errors committed upon a trial, to correct which a defendant in a criminal case asks a new trial. The error in this case occurred after the trial had been legally concluded. To correct this post-trial error defendant is forced to ask for a new trial and, therefore, he puts himself in jeopardy again not upon his free election.

There is an interesting discussion in the Second Edition of Thompson on Trials, which has just appeared, on "The Power of Juries as Judges of the Law," and it is pointed out how inconsistent seems the administration of justice in having the judges instruct the jury upon the law and the latter being free to disregard those instructions if they see fit. The author says: "The evil consequences which flow from educating juries in the idea that they are judges of the law in the sense, which places their judgment above that of the court, and which makes the decisions of the court mere incidental aids or helps to them in making up their judgment upon the law, must be apparent upon the slightest reflection." Sec. 2134.

At the same time, however, we find many constitutional provisions declaring that in criminal cases the jury are the judges of the law and the facts, and therefore, seemingly, as much of the one as of the other. It is an ill constitution that juries should

not be fully educated about. If their power to judge the law, under such expressions, is as absolute as it is to judge the facts, and if it is reversible error for the court to intimate its opinion about facts, why is it not error if it does the same thing about law?

Of course, this would work out a *reductio ad absurdum*, but that is the fault of the Constitution and not of the logic it imposes. And this logic is not answered by the fact, that an appellate court may say that there is harmless error, because an instruction is legally correct. There is a missing link in the reasoning, because neither the trial court nor the appellate court may bind a jury in a criminal case by what it believes to be good law or bad law. It is to be remembered that a decision is law only because it is to be respected as law, whether it be inherently sound or unsound.

There is one consolation, however, about jury-made law, and that is that it never gets outside of the case to which it is applied—even though the same jury should try another case in which the same facts appear. Indeed, there is little or no law about it. There is a mere *fiat*, the reason back of which jurors themselves might never explain. It is something that floats about, like the nebular hypothesis, and the only discussion it evokes is when there is a miscarriage of justice—some fascinating vampire or smooth ruffian for example, going unwhipped of crime.

NOTES OF IMPORTANT DECISIONS

COMMERCE — REQUIRING CONVICT-MADE GOODS TO BE THUS BRANDED.—Massachusetts House of Representatives submitted for opinion of the Justices of the State's Supreme Judicial Court the constitutionality of a proposed act for the branding of goods made in penal institutions, so as to show their places of manufacture. In re Opinion of the Justices, 98 N. E. 334.

This proposed act required that "all goods wares, etc.," made by convict labor in any prison, reformatory or jail in this or any other state be branded before being "exposed for sale in any place within this state." The justices said: "The present bill, in our opinion, goes beyond a lawful exercise of the police power in its direct effects upon interstate commerce. Protection of domestic laborers, manufacturers or merchants against the lawful competition from other states by means of discriminating regulations upon goods manufactured in other states, is an immediate interference with interstate commerce. The circumstance that goods made by convicts in this commonwealth are included does not save the bill from primarily affecting commerce between the states. One who purchases prison-made goods in other states has a right as complete and extensive to sell them upon their own merits as he has to sell private-made goods of like nature."

The justices then go on to say that such goods are lawful subjects of commerce, that there is nothing wrong in their nature and employment of convicts in useful labor is recognized as a necessity for health and improvement of those paying the penalty of conviction for crime, and there is nothing in the way of health or morals to be subserved or any fraud upon the public to be guarded against by such legislation. It was, therefore, held unanimously it would be unconstitutional.

It seems strange to us that it could be supposed by any one that such legislation by a state could be considered as lacking in every element of unlawful interference with interstate commerce. We do not know, however, how a court of the people would vote on the recall of such a decision.

Supposing, however, it would vote the other way, it would be something of a spectacle to see the federal supreme court recalling the judicial decision of the people on the question, if it be true as the justices say that their ruling "is the inevitable conclusion from doctrines announced and applied in judgments of the Supreme Court of the United States by which we are bound." In this way our greatest court might come in conflict with and overpower the judicial temperament of a majority of the people of the states.

CONTRACT—INDEMNITY AGAINST LIABILITY FOR NEGLIGENCE CAUSING INJURY TO THIRD PERSONS.—The case of Pennsylvania Steel Co. v. Washington & Berkley B. Co., 194 Fed. 1012, comes very close to

an affirmative holding that indemnity employers' insurance is not against public policy, but there yet remains a suggested distinction.

It appears that a contractor doing bridge work for another company provided for indemnity, as a part of its contract, against liability for its negligence resulting in injury or death to its employees in the course of work under the contract.

The indemnified company sought reimbursement on a judgment it paid in favor of one of its employees and it was pleaded that the contract violated public policy. The judge in overruling this defense said: "Under modern conditions, when Congress and State Legislatures in this country are considering the passage of employers' liability acts, entitling employees to recover for injuries regardless of defenses of assumed risk and contributory negligence, based largely upon the proposition that under such conditions employees may know in a measure the conditions and extent of liability, and, may by general insurance, indemnify themselves against such, the courts are not warranted longer in my judgment in holding such indemnity insurance contracts void as against public policy, although under other conditions they may have in principle in some instances practically done so."

All of this was going beyond the mark, as the contract that was held not void as against public policy was but an incidental provision in a contract whereby the indemnitees engaged to do the work that was contracted for, and none of the cases referred to in support of the ruling of its validity is outside of such situation.

But indemnity insurance is where a third person, of his own motion, intervenes with indemnity, not an incidental thing, but only to earn compensation from and by means of an incidental thing.

It seems no wonder, then, that language about general insurance of this kind is somewhat apologetic in tone and manifests a sense of duty on the part of courts to outstrip legislation, notwithstanding they believe the law-making part of the country is as well aware of modern conditions as are the courts. If this might appear to be somewhat presumptuous on the part of a state court, what may be thought of a court that only sits as a substituted tribunal? It is enough "to make the angels weep."

EXECUTORS AND ADMINISTRATORS—LIABILITY FOR ADVANCEMENTS FOR FUNERAL EXPENSES.—We noticed in 74 Cent. L. J. 45, a decision by St. Louis Court of Appeals in favor of an employer paying funeral expenses of a decedent killed in course of employment and now refer to a case by Surrogate's Court of New York County, in which a claim against an estate was disallowed. In re Moran Estate, 134 N. Y. Supp. 968.

This case, however, does not disagree in principle with the ruling to which we formerly adverted, but turns upon the fact, that one advancing money for the funeral expenses of a deceased brother never intended to charge the estate therefor, as shown by circumstances, especially one that the estate outside of an insurance policy in favor of the surviving brother, was so very small that it would have been more than consumed by such expense.

The Surrogate goes into a very elaborate discussion of common law authority on this subject, with the result of deducing the conclusion, that there may arise an implied promise, sufficient to sustain an action of assumpsit against personal representative of a deceased. The Surrogate states, however, that "as great a judge as Lord Holt said in substance, in the year 1698, that there could be no recovery, 12 Mod. 256."

The Surrogate points out that by the civil law there was furnished "a very complete apparatus when applied to such a question" of whether "the estate was chargeable," but the common law was defective in this regard.

However the surrogate concludes that "a stranger, or one not an executor or administrator can recover the burial expense incurred of necessity, if reasonable, over against the personal representatives of the deceased only on an assumpsit or implied promise, and that the estate is not, as it would be at the Roman law, liable independently as a juristic entity." As this question is generally settled by statute making such expense one of the debts of administration, this reasoning is greatly eliminated, but the question of intent by the party incurring the expense to charge the estate and the necessity and reasonableness of the expense remain as raising or not an implied assumpsit. The force of statutes calling such an expense of administration would seem to bring the estate to what the Surrogate calls "a juristic entity" as at civil law.

DISBARMENT OF AN ATTORNEY FOR ABUSE OF PROCESS.

The case of Wernimont v. State,[1] recently decided by the Supreme Court of Arkansas, is interesting upon the question of disbarment of an attorney for unprofessional conduct. The proceedings were begun by a motion filed by the Grievance Committee of the Little Rock Bar Association, in conjunction with the prosecuting attorney on the part of the state, charging that the defendant had been "guilty of misdemeanor in his professional capacity, and of unprofessional conduct as an attorney, so as to render him unworthy and unfit to be a member of the profession." Upon the trial the court found from the pleadings and evidence "that these allegations were sustained by the evidence and thereupon entered its judgment of disbarment.

The case is one out of the ordinary in some respects. Two fire insurance companies of the state had become insolvent and placed in the hands of receivers. Among the assets of these companies were a large number of notes aggregating about $15,000, in small amounts ranging from five to twenty-five dollars, and were executed by persons all over the state who had dealt with these defunct companies. About five hundred of these notes held by one of the companies, of the face value of about $6000, were advertised for sale by the receiver in the usual course of winding up the trust. At the sale, the defendant, as president of an investment company, bid $50 for the whole amount of the notes which seems to have been the best bid and was accepted by the receiver. It seems, also, that the defendant had no one in view for whose account the notes were to be purchased until a few days later, when he mentioned the purchase to a Mr. Miller, who requested that the purchase be made for his account, to which defendant assented, and at defendant's request the receiver executed a bill of sale of the notes to Miller, who paid the amount of defendant's bid therefor. Thereupon Miller took all the notes to the said investment company and proposed to sell them in bulk to it. The defendant, representing the investment company, thereupon entered into a written contract with Miller whereby Miller should indorse and guarantee the payment of all the notes. Later the notes of the other insurance company were secured by Miller for a small sum and similarly indorsed. The investment company with which defendant was connected agreed to pay Miller twenty per cent of all the notes when collected, with the understanding, however, that if any were not collected, and the face of such uncollected notes thus guaranteed by Miller exceeded the twenty per cent of the notes collected, then Miller should receive nothing further from the investment company, but should pay to it the amount of such excess. The defendant admitted that this arrangement with Miller was to secure a guarantor who lived in the county of defendant's residence "so that juridiction could be acquired in suits instituted in that county, over his person, and thereby, under the statutes of the state, to acquire jurisdiction over the persons of the makers of the various notes" who lived in many different counties throughout the state. Thereupon suits were instituted upon several hundred of these notes in the county of the residence of the defendant against Miller and each of the makers of the different notes. Miller acknowledged service of summons in all the cases and process was issued in all the suits to the defendants all over the state. A large number of these suits proceeded to judgment by default. "In some of the cases, the makers of the notes appeared and charged that the alleged transfer by Miller to the investment company was a sham and fraud in order to secure jurisdiction over them, and motions to quash the service for these reasons was made in the justice court, but without avail. A great many appeals were taken to the circuit court at Little Rock,

(1) 142 S. W. Rep. 194.

heard in the circuit court, the investment where the motion to quash was renewed. In most cases before the same could be company, through the defendant as its attorney, dismissed them and, before trial in any, took non-suits.

The court held that the proceeding to disbar an attorney was a civil, not a criminal procedure, and that "it is well settled that the power of removal from the bar is possessed by all courts which have authority to admit attorneys to practice." And that this power is inherent in the court. That "such power should be exercised with caution and only for reasons which would render the continuance of the attorney in practice inimical to the just and proper administration of justice, or subversive of the honor and integrity of the profession." The court held that the statute authorizing an action against all persons, jointly liable under the law in any jurisdiction where any one of them might be found and served with summons applied only in cases where the defendant in the jurisdiction of the court where the action is brought is a *bona fide* defendant and not where there is a conspiracy between the attorney for the plaintiff and the local defendant to perpetrate a fraud on other defendants and the court in thus improperly dragging them from the jurisdiction of their residence to some distant court. The lower court held that this conduct of the accused attorney, shown by the uncontradicted evidence in the case, amounted to malpractice and a perversion and abuse of the process of the court rendering the accused an unfit person to continue the practice of law.

Both the lower and appellate courts were evidently right. The high and sacred calling of the lawyer supported by a proper sense of ethical duties of the lawyer to himself, the court, his client, and even the client of his adversary, forbids such injustice and oppression as was attempted by the accused according to the finding of the court in this case. Indeed, the decision is a gratifying indorsement of the high ideals to which all reputable lawyers should aspire and a solemn menace to those who would demean themselves otherwise. It is the privilege and duty of the courts at all times to stifle any species of oppression and fraud under whatever guise or by whatever pretext attempted. If the attorney in question had been sustained in forcing several hundred litigants from all over the state to come to Little Rock to contest in the courts of a strange jurisdiction a small claim ranging from five to twenty-five dollars, and usually only five or ten dollars, it is manifest that a great injustice would be done all these innocent defendants. Then, too, it should be remembered that these notes were purchased for a merely nominal sum. They were for future insurance protection which had failed because of the insolvency of the companies and were practically, if not literally, without consideration. It would indeed be a reproach to the law to sanction such a scheme and conspiracy to force innocent people to pay these unconscionable demands. The decision is a salient reminder that a lawyer should be always alert and not deviate either to the right or the left in the performance of the honorable and responsible duty imposed upon him by the profession in which he chooses to cast his lot. There is no profession which calls for a more sacred fidelity to duty than the law and it should be the pride and pleasure of every lawyer to do his full part in keeping the standard of conduct at the highest perfection attainable.

W. C. RODGERS.

Nashville, Ark.

INJUNCTION—SPITE FENCE.

NORTON v. RANDOLPH.

Supreme Court of Alabama, April 4, 1912.

A landowner has no right to maintain a "spite fence," which is one erected solely for the malicious purpose of vexing and injuring another landowner in the enjoyment of his land.

SOMERVILLE, J.: The bill is filed by the appellee, Randolph, against the appellant, Mrs. Norton, seeking to abate an alleged nui-

sance erected by her on a vacant lot adjoining his residence property in the city of Birmingham. The averments of the bill are substantially as follows: Complainant is the owner of a lot on which he has erected for selling or renting a valuable dwelling house, costing about $6,000. This dwelling is in a desirable part of the city, and many other dwellings of like character have been erected on the same street. Respondent owns a vacant lot, immediately adjoining complainant's lot, "which is vacant and unimproved property and is not used by her for any purpose." She has nevertheless erected on said vacant lot, within three or four feet of complainant's house, "a large plank wall or structure about 20 feet high and 30 feet long, by means of which she has almost entirely excluded the air and light from the rooms on that side." This structure is alleged to be useless, and also unsafe, in that it endangers the adjoining dwelling by its liability to be blown over and thus cause damage thereto. It is further alleged that this structure "does not serve any useful purpose, nor add any value to the property of the said Laura J. Norton"; and that complainant "does not know for what purpose said structure was erected by the said Laura J. Norton, unless it was for the purpose of vexing, annoying, and injuring" him, "by preventing him from using his property, either by sale or rent; and that it has prevented his selling or renting said property, and its selling or renting value has been greatly diminished thereby." Respondent demurred to the bill as a whole, and assigned the following grounds: "(1) For that there is no equity in said bill. (2) For that complainant has an adequate remedy at law for the matters and things complained of therein. (3) For that it does not sufficiently appear therefrom that the said wall or structure alleged to have been erected by defendant is a nuisance. (4) For that it is not sufficiently shown that the said wall or structure erected by defendant is dangerous, unsafe, or defective, or was not erected with proper and necessary skill and care, nor that same is unsafe in such way or measure as to constitute same a nuisance. (5) For that it does not sufficiently appear from the bill that defendant's erection of said wall or structure on her lot was not lawful nor in the exercise of her subsisting legal rights, nor that she has thereby interfered with complainant or his property, or his legal rights or privileges." The chancellor overruled the demurrer, and the appeal is from that decree.

(1, 2) The jurisdiction of equity to abate nuisances by injunction is too well settled to require discussion. The main question therefore involved in this case is whether the allegations of the bill, which are admitted to be true by the demurrer, establish such a nuisance as to justly invoke the intervention of a court of equity.

(3, 4) We think it clear that the averments of the bill are insufficient to show that the structure complained of is dangerous to the safety of complainant's premises in such sense as to constitute a nuisance, and the grounds of demurrer pointing out this defect should have been sustained had they been directed and limited to that aspect of the bill. But, being directed to the whole bill, they were properly overruled if the bill had equity in some other aspect.

(5, 6) We come then to the decisive questions raised by the fifth ground of demurrer: Is the structure described in the bill brought by appropriate averment within the class known in legal parlance as "spite fences"; that is, was it erected by respondent solely for the malicious purpose of vexing and injuring complainant in the lawful use and enjoyment of his dwelling house, and was it at the same time devoid of all benefit or value to respondent in the use or improvement of her property? And, if so, is it legally a nuisance?

It is, of course, true, as argued by appellant, that the old English doctrine of ancient lights is not, and never has been, in force in this state. Ward v. Neal, 37 Ala. 500. And the general rule is well settled that the owner of land has no right as against adjoining owners to the unobstructed access of light and air to his premises over adjoining premises, unless such right has been acquired by grant express or implied.

Many of the cases dealing with the subject of malicious structures like the one here complained of are cited and reviewed in a case note to Koblegard v. Hale, 60 W. Va. 37, 53 S. E. 793, 116 Am. St. Rep. 868, 9 Ann. Cas. 732-734, and the great weight of authority, it must be conceded, is opposed to the equity of complainant's bill. Bordeaux v. Greene, 22 Mont. 254, 56 Pac. 218, 74 Am. St. Rep. 600; Metzger v. Hochrein, 107 Wis. 267, 83 N. W. 308, 50 L. R. A. 305, 81 Am. St Rep. 841; Guethler v. Altman, 26 Ind. App. 587, 60 N. E. 355, 84 Am. St. Rep. 313; Fisher v Feige, 137 Cal. 39, 69 Pac. 618, 59 L. R. A. 333, 92 Am. St. Rep. 77.

The doctrine of these cases, based on the alleged right of the owner of land to use it according to his malicious fancy, and without any advantage to himself or his land, for the sole purpose of injuring his neighbor in the lawful and beneficial use of his adjoining prop-

erty, has been carried to such an extent as in many cases to be justly characterized as "odious." And hence statutes have been passed in a number of states abrogating the principle on account of the unjust and injurious effects resulting from its enforcement.

The authority of precedents, however, must often yield to the force of reason, and to the paramount demands of justice as well as the decencies of civilized society, and the law ought to speak with a voice responsive to these demands.

We have examined the decisions and the reasoning of the various courts upon this question; and, unfettered by any precedents of our own, we are led to the deliberate conclusion that the majority view, as above stated, is founded upon a vicious fallacy, and is violative of sound legal principle as well as of common justice.

This conclusion has already found eloquent and forcible expression in decisions of the Supreme Courts of Michigan and North Carolina. Burke v. Smith, 69 Mich. 380, 37 N. W. 838; Flaherty v. Moran, 81 Mich. 52, 45 N. W. 381, 8 L. R. A. 183, 21 Am. St. Rep. 510; Kirkwood v. Finegan, 95 Mich. 543, 55 N. W. 457; Peek v. Roe, 110 Mich. 52, 67 N. W. 1080; Barger v. Barringer, 151 N. C. 433, 66 S. E. 439, 25 L. R. A. (N. S.) 831, 19 Ann. Cas. 472. And, it may be added, its underlying reasons have been convincingly stated in the decisions of several other states in the course of opinions dealing with and sustaining the constitutionality of statutes making certain malicious and nonuseful structures unlawful. Horan v. Byrnes, 72 N. H. 93, 54 Atl. 945, 62 L. R. A. 602, 101 Am. St. Rep. 670; Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560.

As said by Parsons, C. J., in Horan v. Byrnes, supra: "The conclusion that a landowner's property right in real estate includes the right to use it solely for the injury and annoyance of his neighbor, without intending to subserve any useful purpose of his own, is based upon a narrow view of the effect of the land titles, and is reached by the strict enforcement of a technical rule of ownership briefly expressed in an ancient maxim, 'Cujus est solum, ejus est usque ad coelum.' * * * Because when employed for a useful purpose such use may rightfully injure another, it does not follow that the same use for a wrongful purpose may also rightfully injure another, except upon the theory of absolute dominion, for the character of the use is an element of the right. * * * As, therefore, the statute does not deprive the plaintiff of any right to a reasonable use of his land, but only prohibits an unnecessary, unreasonable use, it does not deprive him of any property right."

And as said by Holmes, J., in Rideout v. Knox, supra: "But it is plain that the right to use one's property for the sole purpose of injuring others is not one of the immediate rights of ownership; it is not a right for the sake of which property is recognized by the law, but is only a more or less necessary incident of rights which are established for very different ends."

We approve the judicial reasoning as well as the Christian ethics of the Michigan court as expressed in the language of Morse, J., in Burke v. Smith, supra: "If a man has no right to dig a hole upon his premises, not for any benefit to himself or his premises, but for the express purpose of destroying his neighbor's spring, why can he be permitted to shut out light and air from his neighbor's windows maliciously and without profit or benefit to himself? By analogy, it seems to me that the same principle applies in both cases, and that the law will interpose and prevent the wanton injury in both cases. * * * It must be remembered that no man has a legal right to make a malicious use of his property, * * * for the avowed purpose of damaging his neighbor. To hold otherwise would be to make the law a convenient engine in cases like the present to injure and destroy the peace and comfort, and to damage the property of one's neighbor, for no other than a wicked purpose, which in itself is or ought to be unlawful. The right to do this cannot, in an enlightened country, exist either in the use of property or in any way or manner. * * * The right to breathe the air, and to enjoy the sunshine, is a natural one; and no man can pollute the atmosphere, or shut out the light of heaven, for no better reason than that the situation of his property is such that he is given the opportunity of so doing, and wishes to gratify his spite and malice toward his neighbor. * * * I do not think the common law permits a man to be deprived of water, air, or light for the mere gratification of malice."

We quote also the following language of Brown, J., in Barger v. Barringer, supra, adopted by the North Carolina court: "There are many annoyances arising from legitimate improvement and business which those living near must endure, but no one should be compelled to submit to a nuisance created and continued for no useful end, but solely to inflict upon him humiliation as well as physical pain. The ancient maxim of the common law, 'Sic utere tuo, alienum, non laedas,' is not

founded in any human statute, but in that sentiment expressed by Him who taught good will toward men, and said 'Love thy neighbor as thyself.' Freely translated, it enjoins that every person in the use of his own property should avoid injury to his neighbor as much as possible. No one ought to have the legal right to make a malicious use of his property for no benefit to himself, but merely to injure his fellow man. * * * The doctrine of private nuisance is founded upon this humane and venerable maxim of the law. If it can be successfully invoked to prevent the keeping of stables and hogpens so near one's neighbor as to cause discomfort, why cannot he whom it is sought to needlessly and maliciously deprive of air and sunlight also seek the aegis of its protection? The right thus to injure one's neighbor with impunity cannot long continue to exist anywhere in an enlightened country where God is acknowledged and the Golden Rule is taught. On this subject, if need be, we will do better to follow the pandects of the heathen Romans, whose jurists have inculcated a doctrine more consistent with the teachings of Him whom they permitted to be crucified, than to be governed by the principles of the common law as expounded by some Christian courts and text-writers."

But little else remains to be said in support of the rule of reason and good morals. The rule of malice was, we think, conceived in error, and has indeed become a Caliban of the law—the ugly and misshapen offspring of a decent and honorable parentage—and we are unwilling to sanction in this jurisdiction its evil and odious sway. We therefore hold that there is equity in the bill of complaint.

(7, 8) As a matter of pleading, however, we think the averments of the bill are not sufficient to bring the case clearly within the rule above enunciated. It should be distinctly alleged, not only that the structure complained of is entirely useless to the respondent, and without value to her property, but also that it was maliciously erected for the purpose of injuring complainant in the use and enjoyment of his property. It may be conceded that the facts stated in the bill are sufficient to justify the inference of malice as a matter of evidence merely, but they may conceivably be consistent also with its absence; and, on demurrer, the averments of fact must, of course, be strictly construed against the pleader in so far as opposing conclusions may be drawn. Nor does the averment that complainant does not know for what purpose said structure was erected, * * * unless it was for the purpose of vexing, annoying, and injuring" him, meet the requirements of good pleading as to the assumption of the burden of proof by complainant in this regard.

The fifth ground of demurrer should therefore have been sustained, and to that extent the decree of the chancellor will be reversed and a decree here rendered to that effect.

Reversed and rendered. All the Justices concur.

NOTE.—*Malice in the Erection of a Fence as Giving Right of Action to Adjoining Land Owner.*—The principal case has set forth with all of the fullness desired the reasoning upon which cases in support of its conclusion go. It must be admitted that the excerpts given are not models in the presentation of close legal argument, but they rather appeal to sentimental and moral, rather than legal, considerations. And what appear two principles well-settled and yet strongly militating against what they hold they hardly notice and would scarcely deny. One of these principles is that a land owner has no legal right to air, light and prospect, so far as the use of his land by an adjoining owner is concerned. 19 Am. & Eng. Encyc. of Law (2d Ed.), pages 118-121. The other principle, for which authority may be cited *passim*, is that no actionable wrong can arise where another's legal right is not invaded, whatsoever may be the motive of an act of another complained of.

In a dissenting opinion by Hoke, J. (Manning, J., concurring), in the case of Barger v. Barringer, *supra*, from the main opinion in which the principal case quotes extendedly, the principles above referred to are set forth and a great abundance of authority cited. This dissent shows indeed, that the origin of such ruling as the principal case follows is Burke v. Smith, 69 Mich. 380, 37 N. W. 838, from which the principal case also makes an excerpt, but fails to state that Judges Campbell and Champlin dissented, the case being merely affirmed upon an equal division of the judges.

The former of these wrote the dissent and as he has been esteemed one of our great American judges, it is well to quote from him. He said, referring to the case of Mahan v. Brown, 13 Wend. 261: "There a fence was put up, as the screen was here, for the express purpose of preventing the view from the windows over defendant's ground. The court held, that where there was no right to the prospect, there was no wrong in fencing it out, and that the defendant's motive was of no consequence as he was in the exercise of his own right." He then shows where this doctrine has been repeatedly enforced. He also said: "If we should grant the complainant relief, we should not only be going beyond the judicial province in making the law, but we should also make a rule in conflict with the universal weight of authority." When it was urged there was foundation for such relief in the civil law, he said: "I have searched diligently

and found no such authority. On the other hand the civil law reckoned the right of one proprietor to secure a prospect over his neighbor's land as an easement which could only be gained by grant, or possibly by such prescription as would be equivalent to a grant." Judge Champlin in concurring with Judge Campbell, said: "The decisions have been quite uniform to the effect that the motives of a party in doing a legal act cannot form the basis upon which to found a remedy against such party. Under these circumstances, it should be left to the Legislature to define and prohibit the act and declare the remedy, as has been recently done in Massachusetts, Vermont and some of the other states."

In Lord v. Langdon, 91 Me. 221, 39 Atl. 552, the bearing of a statute providing that any fence unnecessarily exceeding six (formerly eight) feet in height maliciously kept and maintained, was considered and the rule of no action was recognized and recovery is made pointedly to depend on malevolence in unnecessary height above the statutory limit. See also Healey v. Spaulding, 104 Me. 122, 71 Atl. 472.

And the Masachusetts statute providing that a fence unnecessarily exceeding six feet maliciously erected for the purpose of annoying the owners of adjoining property should be deemed a private nuisance only applied to a fence on or near a division line and a fence from three to ten feet distant extending its entire length was not such a fence. Bostrom v. Lauppe, 179 Mass. 315, 60 N. E. 785. The fence was of excessive height and the jury found as a fact that it was maliciously erected and maintained for the purpose of annoying the owner and occupant of the adjoining property. Plaintiff was denied recovery.

The principal case fails to note the fact that Horan v. Byrnes, *supra*, from which the opinion quotes, rested upon a statute and the defendant raised no question as to its constitutionality. The New Hampshire statute is in the same language as that of Massachusetts, except its says five feet.

In a note in 25 L. R. A. (N. S) 831, to Barger v. Barringer, quoted from in principal case, it is said that only in one or two states has it been held as in the principal case and notes so show to Letts v. Kessler, 40 L. R. A. 177 and Passaic Print Works v. Ely & Walker D. G. Co., 62 L. R. A. 683.

In Bloom v. Koch, 63 N. J. Eq. 10, 50 Atl. 621, the ruling against a fence went upon an implied easement, arising between grantor and grantee, which passed because influx of air and light were cut off from the only available source and by reason thereof grantee's house was made damp and unhealthy. The court restricted right of relief to all the circumstances.

We think no one may read such excerpts as the principal opinion quotes or its own appeal to such elusive considerations as it makes use of without reflecting that the administration of justice is far other than an exact science and that its precedents will be full of bewildering confusion. It is rarely justifiable for courts to assume the functions of legislation and it tends to demoralization for them to abandon precedent. Vested rights depend on precedents and the doctrine of a rule of property should be more rigidly applied as to real estate than to any other kind of interest. C.

BAR ASSOCIATION MEETINGS — WHEN AND WHERE HELD.

AMERICAN—Milwaukee, August 27-31.
ALABAMA—Montgomery, July 12 and 13.
COLORADO—Colorado Springs, first week in July.
INDIANA—South Bend, July 10 and 11.
IOWA—Council Bluffs, June 27 and 28.
KENTUCKY—Louisville, July 10 and 11.
MAINE—Augusta, January 8, 1913.
MARYLAND—Cape May, N. J., July 1, 2, 3.
MICHIGAN—Saginaw. Date not fixed.
MINNESOTA—Minneapolis, August; date not definitely fixed.
MISSOURI—St. Louis. Date not fixed.
NEBRASKA—Omaha, last week in December.
NORTH CAROLINA—Morehead City, July 3, 4, 5.
NORTH DAKOTA—Jamestown, September 3 and 4.
OHIO—Cedar Point, July 9, 10 and 11.
PENNSYLVANIA—Cape May, June 25, 26, 27.
SOUTH DAKOTA—Pierre, January 15 and 16, 1913.
TENNESSEE—Knoxville, July 9, 10 and 11.
TEXAS—Galveston, July 2, 3, 4.
VIRGINIA—Old Point Comfort, August 6, 7, 8.
WASHINGTON—Tacoma, July 31, August 1, 2 and 3.
WEST VIRGINIA—Grafton, July 17 and 18.
WISCONSIN—Milwaukee, August 27.

CORRESPONDENCE.

COMMON LAW AND CONTINENTAL PROCEDURE CONTRASTED.

Editor Central Law Journal:

I have read with more than ordinary interest the articles from the pen of Mr. Axel Teisen of Philadelphia, Pa., entitled Continental and Common Law Procedure Contrasted," the first of which was published in your issue of January 12th of this year. While the article is well written, a careful examination will disclose that the writer is no better informed about his subject than critics are in most cases. That his criticisms may apply with full force to Pennsylvania laws and courts, and maybe others, is altogether possible, but it is certain that they do not apply to those of Georgia. While in a great many things our methods are as out of date as the stage coach, yet we are progressive in others and are really progressing, if the change which I am about to call attention to is real progression.

On page 32 of the number mentioned the

writer says: "Under your present system, it is of interest to the practitioner to get even irrelevant evidence in, because when once admitted, it becomes part of the evidence of the case, upon the basis of which it will be determined."

Hear our Supreme Court on this question. I quote from the opinion in the case of Suttles vs Sewell, 117 Ga., beginning at page 214: "It seems clear to us that the verdict of the jury should have been set aside, unless it can be said that there was sufficient legal evidence to warrant a finding that the plaintiff did not come into a court of equity with clean hands."

What we have set out is the only legal evidence that was set out to prove a conspiracy such as was alleged." This statement follows a recital of certain parts of the evidence.

"Although there was no objection to this testimony, it was merely hearsay and was therefore not evidence. It was illegal and inadmissible under any view of the case, and, even if admitted, was of no probative value. Claflin vs. Ballance, 91 Ga. 412; Eastlick vs. Southern Railway Co., 116 Ga. 48." This follows a statement of certain evidence in the record.

"Taking into consideration the testimony of all the witnesses, we think that there was no sufficient legal evidence to authorize a finding that the plaintiff and her brother conspired to delay the collection of the debt for which the property was sold.

"In this case it is apparent that the illegal and inadmissible evidence referred to (in the opinion) had much to do with the finding of what seems to the writer to be not a true verdict."

Again, our Supreme Court has said, in the case of Southern Railway Company vs. Farrar Lumber Company, 136 Ga. 479, "Excluding from consideration hearsay testimony, which has no probative value, the verdict directed by the court was demanded under the other evidence introduced upon the trial." The hearsay testimony referred to was a statement in a letter which was introduced apparently without objection.

I am constrained to write this short statement because of two things—first, I do not believe a criticism of our courts and laws based upon a false premise should go unchallenged; and second, because I think there is enough material for criticism without manufacturing any.

Very truly yours,

Atlanta, Ga. W. H. T.

CORAM NON JUDICE.

POETIC PLEADING.

Poetry in the law is not unusual, although pleadings in verse are not common.

Yet so conspicuous is a recent pleading filed in the District Court for Creek County, Oklahoma, that the entire bar of that county has requested us to publish a poetic declaration recently filed and received by the court of that county and which is believed to be of more than usual merit. The pleading follows:

In the District Court, Within and For Creek County, in the Twenty-second Judicial District, of the State of Oklahoma.

Ella Brown, Plaintiff,
vs.
Henry Brown, Defendant. No. 2445.

Petition.

Most noble judge, hear the plaintiff, Ella Brown,
Who donning her best, has come up town,
Not as of yore, on work is she bent,
But imploring justice, defendant won't repent.
And these constitute her cause of action,
Enough? Yes to drive her to distraction.

First.

The plaintiff at the age of just nineteen,
Was as fair a damsel as e'er was seen,
T'was then defendant, dashing Henry Brown,
Wooed and won her in old Muskogee town.
On the twelfth day of November, nineteen hundred and four,
The gallant Henry called at her mother's door.
He vowed his love for her should never fail,
And he would tote in juicy possums by the tail.
He would furnish her things to her heart's content,
So long as he had a dollar, dime or cent.
With such wonderful eloquence, Sir Henry pled,
That Ella consented and straightway they were wed.
Two years in Muskogee lived Mr. and Mrs. Brown,
When they heard of Sapulpa, the magical town.
To the wonderful city they started by rail,
But to them the train's pace seemed slow as a snail.
The marvelous Sapulpa was reached at last,
And six more years have faded into the past.
In Creek County, Oklahoma, plaintiff has lived more than a year,
The year next preceding, now do you hear.
To this one time happy home of yore,
Came prattling children numbering four.
Of these, three survive unto this good day,
Namely, Venore, Jessie and Ona May.
The first a girl of six, second a boy of four,
Third, a baby girl 'bout a year or little more.

Second.

Plaintiff further states, that during all this time,
She has been a loving wife, keeping dutifully in line;
Not so with the defendant, Henry Brown,
He has been a rounder in the good old town.
Scattered his affections to the Oklahoma breeze,
Staying out late at night, doing as he please.
Broke the loving promises he eight years ago did plight,
Then centered his affections on a girl that isn't white,
She's dusky Georgia May——, last name unknown,
(I'm telling his shortcomings in an undertone.)
And just because he's guilty and I've found he isn't true,
He says he'll kill me with his pistol and kick me with his shoe.
This year, on unlucky Friday, April twenty-six,
He carried out his plan of beating me with sticks.
The big end of a buggy whip, is what the villain used,
And from my head and arms, the blood did freely ooze.

From such inhumane treatment, I'd like to get relieved,
And this I'm entitled to, if my story is believed.
I'd like you to enjoin him and make him stay away,
And let me live at home with my babies day by day.
The household goods, I'd like to have and alimony if you please,
Better give the coin to me, he'll fling it to the breeze.
He's young and stout and able to work and hustle,
That's better than licking me, to exercise his muscle.
Lots 25 and 26, Block Two, Westport Addition to Sapulpa, I own,
(The deed was made to Henry), but I want it for my home.
Now don't forget my lawyers, they helped me out in this,
An attorney fee, Pendente Lite, I'm sure will not come in amiss.
Wherefore, Judge, to you, plaintiff prays for a decree,
That from the bonds of matrimony, will ever set her free;
Also the children, to feed and clothe and send to school,
She'll teach them good manners, and to observe the golden rule.
As from her fireside, defendant so frequently did roam,
She'd like to have the house and lots, to make her earthly home,
And the household goods in it she'll need,
And for these she will ever plead;
And to her lawyers, a hundred dollar fee, without subtraction,
Also, please charge up to Henry, the costs of this action.

HUGHES & MILLER,
Attorneys for Plaintiff.

BOOK REVIEWS.

DUNN ON THE AMERICAN TRANSPORTATION QUESTION.

No question is more prominent in the public mind than the problems connected with transportation. The power to make rates for the transportation of merchandise is like the power to tax, a power to destroy. When this idea gripped the people of this country they characteristically demanded the immediate right to control rates and even to fix rates without any knowledge of the elements that should enter into such a calculation fixing a rate for the transportation of goods.

Many unthinking people believe rates can be uniform for all people and for all kinds of service. Determine, they say, the capital invested and the cost per mile for transportation per ton of merchandise and then make a uniform rate that will meet this charge and a reasonable profit on the legitimate capital invested.

But this very beautiful and apparently very simple proposition was found to be chimerical. A car load (60,000 pounds) of coal is worth approximately fifty dollars, while a car load of shoes is worth fifteen hundred dollars. To carry a car of either coal or shoes from St. Louis to New York costs fifty dollars. Shall both, therefore, pay the same rate? At once this is seen to be unfair and the natural conclusion is that the shoes being more valuable, could easily stand a larger rate above the average and thus permit coal, a cheap commodity, to be carried at a rate that would not be prohibitive and so the railway company charges approximately $87.50 for the car of shoes and $12.50 for the car of coal and thus obtains the same result in a more equitable manner.

Moreover, if the long haul pays in the same proportion as the short haul, then the rate in the former case becomes prohibitive and a monopoly is created in favor of nearby markets. Thus, if the rate were $1.00 per car per mile for cattle, a car load of cattle from a distance of fifty miles from Chicago would cost fifty dollars, while a car load from Southwest Texas, a distance of one thousand miles would cost one thousand dollars. Thus an absolute monopoly at high prices would result in favor of local cattle owners living near to the great centers of distribution. Some time ago, Salt Lake City complained that the railroads were handling oranges from Redlands to Salt Lake at the same rate that they charged to New York. The case seemed a good one against the railroad company until the latter proved that the rate to Salt Lake City was based on the reasonable cost of service, while the rate to New York was far below this cost, but was justified for two reasons, first, because the roads were hauling cars to the Pacific Coast loaded with merchandise and hauling them back empty. If they could be permitted to haul these cars back full and charge therefor only the difference between hauling the same cars full and empty, plus a reasonable profit, they could secure traffic which otherwise would not move at all and by this method they would be enabled to reduce expenses which, of course, works in turn in favor of a reduction in the average rate. Second, because if they were compelled to charge a uniform price per car per mile from Redlands to New York, the cost would be so high that California oranges must sell in New York for $1.00 each, in competition with Cuban and Italian oranges selling for twenty-five cents a dozen. It does not take a very bright mind to discover that the uniform rate per mile applied in this case would largely destroy the orange industry in California and prove a detriment to eastern public. So the commission, after making certain slight modifications in the rate on California fruits, sustained the main contentions of the railroads as thus advanced.

The above is but an idea of how really great a problem is that of transportation of merchandise in this country and how many elements enter into the calculation to determine a fair rate. Mr. Dunn discusses these elements and many others including that of fair and unfair discrimination, all of which is made clear and simple by the plain and perspicuous style which Mr. Dunn uses. We

have never read a book with more real pleasure and with such a clear perception of the author's meaning. Mr. Dunn has performed a distinct public service in publishing this splendid little volume, which has so successfully made clear to legislatures, courts and lawyers and others having to do with the making and execution of the laws, those simple, yet important considerations that enter into the solution of all public questions of both interstate and intrastate commerce.

Published in one volume by D. Appleton & Co., New York.

VERNON'S MISSOURI POCKET CODE, 1912, ANNOTATED.

The Revised Statutes of Missouri, 1909, in three volumes, in ordinary code size, contains about 4300 pages. Vernon's Pocket Code contains about 1200 pages, after eliminating everything but what is most likely to be needed by the lawyer in his daily practice.

These 1200 pages are printed on thin paper, which helps to reduce the volume to a pocket size of 8x5¼x1½ and, usable as such, it is in a binding of dark blue flexible leather.

While some sections of the revised statutes are omitted, because rarely referred to, yet they are not lost in the index, which is made for these statutes in their entirety, and indicated in bracketed numbers.

The arrangement also of the Revised Statutes is strictly followed with new matter inserted in its proper place.

Annotation, consisting of citations of decisions of Supreme Court, and the three Courts of Appeals of Missouri, comes down to 139 Southwestern Reporter, inclusive.

It is evident that this pocket code will be very popular because of the large shadow cast and the weighty substance imposed by the Revised Statutes in their authentic form. It will be a vade mecum to the lawyer on a journey, the companion of his fireside and easy to consult at his office.

The Pocket Code is executed in the best style of the art preservative of all arts and published by Vernon Law Book Co., Kansas City, 1912.

HUMOR OF THE LAW.

Evening in the shire town of the county of Blank; the circuit court had been in session throughout the day; the presiding judge and the lawyers who had participated in the business of the court were resting from their labors, a log fire burned on the hearth of the old fashioned fireplace in the reading room of the town's chief hostelry; the members of the county bar were out in force, and the lawyers were seated in a semi-circle around the fire, with the judge in the centre as the keystone to the arch thus formed; the lesser lights, the jurors, litigants, and the habitues of the place formed an outer circle intent on listening to the flow of wit and wisdom that always marked these occasions; it was the winter season, and the weather was cold, but the chilly atmosphere did not interfere with the jollity and good cheer that emanated from the inner circle and enlivened the occasion; the "interlocutor," and the "end man" of minstrelsy was there; not under the old familiar nomenclature but their presence was felt and appreciated just the same.

Enter a laxadaisical specimen of something having a structural affinity with the human race; ragged, unkempt and, in its dilapidated and forlorn condition, it would never have been selected as a competitor in a beauty show; its entuorage, however, gave it the unmistakable evidence of belonging to the genus homo.

The chilly atmosphere it had just left, was the impelling motive that caused it to make several ineffectual attempts to penetrate the inner circle to thaw out its benumbed and half-frozen digits; but arches yield only when attacked on the inner periphery and are strongest when assailed on their outer shell, and this arch proved to be no exception to the rule, and so it gave up the attempt with evident ill grace but voiced no protest at its failure.

One of the "end men," a lawyer, vain of his inquisitorial powers, noting the ineffectual attempt it had made to break through the inner circle, began to ply it with questions.

"Stranger in these parts?" queried he.

"Yaas, sir." replied the ill-favored one.

"Traveled far?" quoth he of inquisitorial fame.

"Yaas, sir."

"Ever go through h—l in your travels?" queried the tormentor with a wink in the direction of the select circle.

"Yaas, sir," it responded, casting a swift glance doorward, as if to see whether the line of retreat was unobstructed.

Again the hero of many inquisitorial battles returned to the attack, with:

"Well, sir, tell these gentlemen of the bar, how you found things there?"

It traveled half way to the door before it trusted itself to reply, but when it reached safe vantage ground, it actually smiled with delivering its parting shot:

"Oh, just about the same as here, sir, the lawyers all sit closest to the fire."

The question of using just the right word in a pending bill came up in one of the senate committees. Senator Page insisted that one cannot be too careful about using precisely the word that applies.

"You may have heard," he said, "about the lawyer up in Vermont who died. The editor of the local paper wrote in his obituary that he had 'amassed a large fortune from his legal practice.' But the typesetter added an 's' to the word 'practice,' and then the obituary was vastly more accurate than the editor had intended it to be."

Sunday School Teacher—"Johnny, what is the text from Judges?"

Johnny—"I don't believe in recalling the judiciary, mum."—Brooklyn Life.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Adverse Possession**—Notoriety.—Adverse possession must be as notorious as the nature of the property permits unequivocally indicating to all persons that claimant is exercising dominion over the land.—Locklear v. Savage, N. C., 74 S. E. 347.

2. **Assignments**—Action On.—Where a claim is assigned solely for the purpose of collection the assignee cannot sue in his own name.—Martin & Garrett v. Mask, N. C., 74 S. E. 343.

3. **Bail**—Appeal.—A stipulation in a bail bond on appeal to prosecute with effect means to prosecute with success, and breach of any one distinct condition works a forfeiture.—Commonwealth v. Lenhart, Pa., 82 Atl. 777.

4. **Bankruptcy**—Fraud.—Where a sale on credit was induced by the buyer's fraudulent representations as to his solvency, the seller can recover the property, notwithstanding the fact that the debtor has been declared bankrupt.—Richardson v. Vick, Tenn., 145 S. W. 174.

5. **Banks and Banking**—Cashier.—A bank cashier has greater powers than any other corporate officer, having full charge of the bank's personal property, except as otherwise controlled by the directors.—McBoyle v. Union Nat. Bank, Cal., 122 Pac. 458.

6.——Certificate of Deposit.—Holders of certificates of deposit are depositors in the bank within Const. art. 9, sec. 18, making stockholders in banks liable to depositors in a sum equal in amount to their stock over and above its face value.—J. H. Wilkes & Co. v. Arthur, S. C., 74 S. E. 361.

7. **Bills and Notes**—Holder.—Possession of notes issued by a bank, whose charter provided that they should be receivable by the state as payment of taxes and dues, makes a prima facie case of ownership.—Evans v. Steele, Tenn., 145 S. W. 162.

8.——Maturity.—Assignee of notes secured by mortgage took them, after maturity, from the payee, subject to any defense as to an overdue note which the makers had against the payee.—Roe v. Fleming, Okla., 122 Pac. 496.

9.——Novation.—Where the holder of a note sold bonds, held as collateral security under agreement with the maker, purchased them itself and filed claim in bankruptcy against the obligor, and the note was stamped paid and payment credited in the holder's books, and under the agreement the maker and a third party were to pay any deficiency, such note was extinguished by the new agreement and the cancellation of the instrument, though it appeared that the bonds could not be enforced against the bankrupt's estate.—Citizens' Nat. Bank of New Castle v. Hileman, Pa., 82 Atl. 770.

10.——Pleading.—Plaintiff suing on joint and several note must allege and prove nonpayment by all of the parties.—First Nat. Bank v. Silver, Mont., 122 Pac. 584.

11. **Breach of Marriage Promise**—Postponement by Agreement.—Where performance of a marriage promise was postponed from time to time because of the illness of the woman, the engagement was modified, so as to impose on the man the duty to wait a reasonable time for the woman's recovery before terminating the engagement.—Travis v. Schnebly, Wash., 122 Pac. 316.

12. **Brokers**—Withdrawal.—Where a broker is employed to procure a purchaser, subject to the right of the owner to sell the property, the owner may in good faith withdraw the land from sale at any time and sell the land to a purchaser found by himself before the broker produces a purchaser.—Granger Real Estate Exch. v. Anderson, Tex., 145 S. W. 262.

13. **Carriers of Passengers**—Assaults.—A railroad company was liable for an assault committed by an employe acting as a special policeman charged with the duty of enforcing the company's rules, and receiving all his compensation from the company.—Hedge v. St. Louis & S. F. R. Co., Mo., 145 S. W. 115.

14.—Exemplary Damages.—Where carrier's employes willfully refused to give passenger information requested as to change of cars, the passenger may recover exemplary damages.—Lilly v. St. Louis & S. F. Ry. Co., Okla., 122 Pac. 502.

15.——Initial Carrier.—The initial carrier is liable for ejecting a passenger whose ticket the terminal agent has refused to validate.—Texas & P. Ry. Co. v. Wharton, Tex., 145 S. W. 282.

16.——Negligence.—That an injury to a passenger in a livery carriage arose from the driver's independent act in leaving the carriage unattended did not relieve his master from liability.—John J. Radel Co v Borches, Ky., 145 S. W. 155.

17.——Res Ipsa Loquitur.—In an action against a railroad company for injuries to a passenger caused by the falling of a car window, evidence that almost immediately after leaving a terminal the latch of the window was in a broken condition warrants the submission to the jury of the question of defendant's negligence in inspection.—Bunch v. Charleston & W. C. Ry. Co., S. C., 74 S. E. 363.

18.——Safe Accommodations.—When a railroad company has notice in advance that an

unusual number of passengers will ride on its trains, it must use reasonable efforts to provide safe accommodations.—Chicago, R. I. & P. Ry. Co. v. Lindahl, Ark., 145 S. W. 191.

19. **Champerty and Maintenance**—Deeds.—Where land conveyed, though not in the possession of the grantor, is not held adversely by the occupant, the deed is valid.—Flesher v. Callahan, Okla., 122 Pac. 489.

20.——Illegality.—The agreement of K' with W to prosecute at his own expense a suit to set aside a foreclosure sale under mortgage of W., they to divide the proceeds of sale of the land, in case of success, is champertous, and taints with its illegality the deed of the land from W. to K., so that the deed furnishes no basis for such a suit by K.—Kelley v. Blanchard, R. I., 82 Atl. 728.

21. **Chattel Mortgages**—Crops.—A holder of a second crop mortgage, who seized and sold the property, was liable in conversion to the mortgagee in a first mortgage, which was recorded, though he had no actual knowledge of the prior lien.—Bingham v. Harby, S. C., 74 S. E. 369.

22.——Future Advances.—A chattel mortgage given to secure future advances, in the absence of statutes providing otherwise, need not definitely state the amount secured; it being sufficient if the advances are described with reasonable certainty.—Frank H. Buck Co. v. Buck, Cal., 122 Pac. 466.

23. **Commerce**—Soliciting Orders.—One who solicits orders for liquor by mailing a letter in one city of the state to an address in another city of the state does not solicit a sale involving interstate commerce.—State v. Holmes, Wash., 122 Pac. 345.

24. **Constitutional Law**—Evidence.—Evidence that it was not injurious for female employes to work nine hours a day in a particular factory held to have no bearing on constitutionality of an eight-hour law.—State v. Somerville, Wash., 122 Pac. 324.

25.——Police Power.—Police power is inherent in every sovereignty, for the preservation of public safety, health, and morals.—Motlow v. State, Tenn., 145 S. W. 177.

26. **Contempt**—Civil Proceedings.—While ordinarily attachment will not issue for arrest for contempt in civil proceeding without notice, it may issue under exceptional circumstances.—Douglass-Whisler Brick Co. v. Simpson, Pa., 82 Atl. 760.

27. **Contracts**—Consideration.—If a contract is based upon several considerations some of which are merely insufficient, but not illegal, it is not void; but it is otherwise where one of several considerations from an entire contract is illegal.—C. B. Ensign & Co. v. Coffelt, Ark., 145 S. W. 231.

28.——Public Policy.—An action will not lie to enforce a contract made in violation of the statute or of the common law, or which is immoral in its character, or contrary to public policy.—Cantrell v. Ring, Tenn., 145 S. W. 166.

29. **Corporations**—Burden of Proof.—One seeking to hold a corporation on a guaranty made by its officers, without authority, has the burden of showing that the corporation received and kept the benefits thereof.—National Bank of Western Pennsylvania v. Lake Erie Asphalt Block Co., Pa., 82 Atl. 773.

30.——Dissolution.—Appointment of receivers and administration of an insolvent corporation's assets did not effect a dissolution.—Hirschfield v. Reading Finance & Securities Co., Del., 82 Atl. 690.

31.——Estoppel.—Persons conveying to or receiving conveyances from a corporation as such are estopped to deny its corporate existence.—Daniels v. Roanoke R. & Lumber Co., N. C., 74 S. E. 331.

32.——Fiduciary Relation.—President of corporation, who procures option on land secretly and sells to the corporation without disclosing his interest, held required to account for profits.—Douglass-Whisler Brick Co. v. Simpson, Pa., 82 Atl. 759.

33.——Gross Mismanagement.—An action against the officers and directors of a corporation for gross mismanagement must be brought by the receiver.—Du Pont v. Standard Arms Co., Del., 82 Atl. 692.

34.——Trust Fund.—The assets of a corporation constitute a trust fund for the benefit of a creditor, so that their transfer without the creditor's assent is illegal.—Washburn v. Rainier, 134 N. Y. Supp. 301.

28. **Criminal Evidence**—Admission.—Statements or declarations by accused not amounting to a confession, but from which, in connection with other evidence, an inference of guilt S. W. 206.

36.——Seduction.—In a prosecution for seduction, testimony that prosecutrix was "awful careless with her habits" was properly stricken, as being the mere conclusion of the witness.—State v. Kozlickie, Mo., 145 S. W. 97.

37. **Criminal Law**—Accomplice.—One may be an accomplice in a criminal act which he or she cannot commit alone.—State v. Case, Ore., 122 Pac. 304.

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Central Law Journal.

A LEGAL WEEKLY NEWSPAPER

Published by

Central Law Journal Company

420 MARKET STREET, ST. LOUIS, MO.

To whom all communications should be addressed.

Subscription price, Five Dollars per annum, in advance. Subscription price, including two binders for holding two columes, saving the necessity for binding in book form, Six Dollars. Single numbers, Twenty-five Cents.

Entered at the Post-Office, St. Louis, Mo., as second-class matter.

NEEDHAM C. COLLIER, EDITOR-IN-CHIEF.
ALEXANDER H. ROBBINS, MANAGING EDITOR

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